Terra Damansara Sdn Bhd v Nandex Development Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S1–24–1091 OF 2005
ABDUL MALIK ISHAK J
8 MAY 2006

Civil Procedure — Injunction — Damages — Trespass to land and continuing trespass — Whether parties would be adequately compensated in damages

Civil Procedure — Injunction — Mandatory injunction — Restraining trespass — Principle applicable

Tort — Trespass to land — Encroachment — Insertion of ground anchors — Whether proceeded in good faith a defence

The plaintiff is essentially seeking a mandatory injunction requiring the defendant to remove from the plaintiff's land all permanent and/or temporary structures, be it in the form of ground anchors or otherwise, and a perpetual injunction to prevent the defendant and/or its agent from further encroaching and trespassing onto the plaintiff's land. The plaintiff is the registered and beneficial owner of Lot 55482, Geran 50059 in the Mukim and District of Kuala Lumpur ('plaintiff's land') on which the plaintiff is undertaking the development of a residential project. The defendant is the owner of plots of land adjoining the plaintiff's land and the defendant is similarly undertaking the development of service apartments on the defendant's land. The defendant admits that in carrying out its development, the defendant had caused to be inserted ground anchors into the plaintiff's land without consent from the plaintiff thereby constituting an act of trespass. The defendant explained that it had proceeded in good faith based on the information relayed by its project consultants that Lot 55482 was unoccupied and unalienated. The defendant submits that the plaintiff would suffer no loss or inconvenience by the refusal to grant the injunction as compared to the risk of serious and substantial loss and injury to property and life if the defendant were ordered to remove the ground anchors now. In any event, the defendant says that it expects to destress the ground anchors in less than two weeks' time. The defendant argues that where the plaintiff would suffer absolutely no injustice in the event the injunction is not granted, damages would be more than an adequate remedy for the plaintiff.

Held:

(1) The tort of trespass to land or what is known as trespass *quare clausum fregit* consists of three significant factors. Firstly, it is the act of entering upon land

in the possession of another — here it would be the plaintiff as against the defendant who is the trespasser. Secondly, having entered upon such land the trespasser continues to remain on the land. Thirdly, the trespasser placing or projecting any object upon such land. It must be emphasised that in each case, the entry is without lawful justification (*Barker v The Queen* (1983) 153 CLR 338,356) (see para 10).

(2) Trespass to land is actionable per se without any proof of damage (*Ashby v White* (1703) 2 Ld Raym 938). And liability is certainly strict. If the entry is intentional, it is actionable even though that entry was made under a mistake or the defendant honestly believed that the land was his own or, like the present case, the land was unoccupied and unalienated or that the defendant believed that he had a right of entry on the land (see para 12). The defendant had caused to be inserted ground anchors into the plaintiff's land and that constitutes trespass. It is a trespass that will last so long as the ground anchors are inserted into the plaintiff's land and it gives rise to actions de die in diem — for so long as it lasts, and it is sufficiently obvious (*Winterboiirne v Morgan* (1809) 11 East 395, 405) (see para 14).

(3) The defendant's conduct leaves much to be desired. While recognising that the plaintiff is the registered owner of Lot 55482, the defendant seeks to assert as a matter of right that the ground anchors should remain. The defendant must be advised that any entry beneath the surface of the plaintiff's land, at whatever depth, constitutes an actionable trespass. The failure of the defendant to carry out a land search is indicative of a reckless disregard, and not merely an accidental invasion, of the rights of the plaintiff as the registered owner of Lot 55482 (see para 16).

(4) Notwithstanding its claims of innocent trespass, nevertheless the defendant proceeds to make a calculated decision to remain in trespass by weighing its benefits of continuing in trespass against the rights of the plaintiff to exclusive use and enjoyment of Lot 55482. Without a doubt, the defendant recognises that it has committed trespass on the plaintiff's land. And instead of picking the correct remedial action by removing the ground anchors, the defendant seeks to justify and entrench its position by insisting that it has a better right over Lot 55482 than the plaintiff. In such a situation, it is not open to the defendant to trivialise the harm suffered by the plaintiff in an attempt to avoid the grant of the mandatory and perpetual injunctions by this court (see para 16).

(5) This is not a case where damages may be said to be easily assessed and ascertainable without evidence being led. The ramifications of the defendant's trespass are numerous including but not limited to delay involved in re-planning and seeking the necessary approvals for the re-location of the water pump house for which damages are not easily ascertainable. Even if it were to be argued by the defendant that damages are ascertainable, such damages would be substantial as it would involve the delay in the completion of the plaintiff's development which may further lead to claims by disgruntled end purchasers. In such a situation, the court clearly has no discretion to award damages in lieu of the injunctions sought (see para 20).

[Bahasa Malaysia summary

Plaintif memohon satu injunksi mandatori memerintahkan defendan mengeluarkan daripada tanah plaintif segala struktur-struktur tetap dan/atau sementara, sama ada dalam bentuk sauh tanah ataupun selainnya, dan satu injunksi kekal menyekat defendan dan/atau agennya daripada mengganggu dan menceroboh ke dalam tanah plaintif. Plaintif adalah pemilik benefisial dan berdaftar Lot 55482, Geran 50059 di Mukim dan Daerah Kuala Lumpur ('tanah plaintif') di mana plaintif menjalankan projek pemajuan perumahan. Defendan adalah pemilik beberapa bidang tanah bersebelahan dengan tanah plaintif dan defendan juga menjalankan projek pemajuan pangsapuri servis di tanah defendan. Defendan mengakui bahawa dalam menjalankan pemajuannya, defendan telah menyebabkan sauh tanah dimasukkan ke dalam tanah plaintif tanpa kebenaran daripada plaintif dengan itu menjadikannya satu pencerobohan. Defendan menerangkan bahawa ia telah berbuat demikian secara suci hati berdasarkan informasi yang diberikannya oleh perunding projek tersebut bahawa Lot 55482 tidak berpenghuni dan dimiliki. Defendan menghujahkan bahawa plaintif tidak mengalami kehilangan atau kesusahan jika tidak diberikan injunksi tersebut berbanding dengan risiko yang serius dan kehilangan yang besar dan kerugian terhadap benda dan nyawa sekiranya defendan diperintahkan mengeluarkan sauh tanah tersebut pada masa kini. Walau bagaimanapun defendan juga menyatakan ia akan mengeluarkan sauh tanah tersebut dalam jangka masa kurang daripada dua minggu. Defendan menghujahkan bahawa plaintif tidak akan mengalami sebarang ketidakadilan sekiranya injunksi tersebut tidak diberikan, ganti rugi akan memberikan remedi yang mencukupi kepada plaintif.

Diputuskan:

(1) Tort pencerobohan ke atas tanah ataupun dikenali sebagai trespass *quare clausum fregit* mengandungi tiga faktor-faktor yang penting. Pertamanya, ia adalah tindakan memasuki tanah kepunyaan orang lain — di sini plaintif dan bukan defendan merupakan penceroboh. Keduanya, setelah memasuki tanah tersebut, penceroboh berterusan berada di tanah tersebut. Ketiganya, penceroboh meletak atau menayangkan sesuatu objek di tanah tersebut. Ia mesti dinyatakan bahawa di setiap kes, kemasukan adalah tanpa justifikasi yang sah di sisi undang-undang (*Barker v The Queen* (1983) 153 CLR 338,356) (lihat perenggan 10).

(2) Pencerobohan ke atas tanah adalah satu tort yang boleh diambil tindakan per se tanpa sebarang bukti kerosakan (*Ashby v White* (1703) 2 Ld Raym 938). Dan liabilitinya adalah tegas. Jika kemasukan adalah sengaja, tindakan boleh diambil walaupun kemasukan tersebut adalah di bawah satu kesilapan atau defendan sesungguhnya mempercayai bahawa tanah tersebut adalah miliknya atau, seperti kes ini, tanah tersebut tidak berpenghuni dan dimiliki ataupun defendan percaya bahawa ia mempunyai hak memasuki tanah tersebut (lihat perenggan 12). Defendan telah menyebabkan sauh tanah dimasukkan ke dalam tanah plaintif dan ini menjadikannya satu pencerobohan. Ia satu pencerobohan yang berterusan selagi sauh tanah masih di dalam tanah plaintif

dan ini membangkitkan satu tindakan de die in diem — for so long as it lasts, and it is sufficiently obvious (*Winterboiirne v Morgan* (1809) 11 East 395, 405) (lihat perenggan 14).

(3) Kelakuan defendan sendiri tidak memuaskan. Walaupun ia mengaku plaintif adalah pemilik berdaftar Lot 55482, defendan menegaskan sebagai haknya bahawa sauh tanah patut dikekalkan. Defendan harus dinasihatkan bahawa sebarang kemasukan di bawah permukaan tanah plaintif, pada sebarang takat, menjadikannya satu pencerobohan di mana tindakan boleh diambil. Kegagalan defendan menjalankan satu carian tanah menunjukkan ia bertindak dengan cuai, dan bukan sekadar pencerobohan yang tidak sengaja, terhadap hak plaintif sebagai pemilik berdaftar Lot 55482 (lihat perenggan 16).

(4) Walaupun ia menyatakan pencerobohan tersebut adalah tidak disengajakan, akan tetapi defendan meneruskan dengan keputusan untuk kekal dengan pencerobohan dengan menimbangkan manfaat meneruskan dengan pencerobohan tersebut dan hak-hak plaintif untuk penggunaan dan penikmatan eksklusif Lot 55482. Tanpa diragui, defendan sedar bahawa ia telah melakukan pencerobohan atas tanah plaintif. Defendan tidak memperbetulkan tindakannya dengan mengeluarkan sauh tanah tersebut, akan tetapi ia cuba menjustifikasikan dan menguatkan kedudukannya dengan menyatakan ia mempunyai hak yang lebih ke atas Lot 55482 daripada plaintif. Dalam keadaan ini, defendan tidak boleh memperkecilkan kecederaan terhadap plaintif dalam percubaannya untuk menghalang pemberian injunksi-injunksi mandatori dan kekal oleh mahkamah ini (lihat perenggan 16).

(5) Ini bukannya satu kes di mana ganti rugi dapat ditaksirkan dan ditentukan tanpa bukti. Kesan yang merumitkan ke atas pencerobohan defendan adalah pelbagai termasuk tetapi tidak dihadkan kepada kelewatan yang disebabkan oleh pelan yang perlu dilakukan sekali lagi dan mendapatkan kebenaran-kebenaran yang perlu untuk mengubah lokasi rumah air pam di mana ganti rugi tidak begitu dapat ditaksirkan. Walaupun jika defendan mempertikaikan bahawa ganti rugi dapat dipastikan, ganti rugi semacam itu adalah substantif dan ia akan melibatkan kelewatan menghabiskan pemajuannya yang akan melibatkan tuntutan oleh pembeli-pembeli rumah tersebut. Dalam situasi begini, mahkamah dengan jelas tidak mempunyai budi bicara untuk memberikan ganti rugi sebagai pengganti pelaksanaan spesifik yang dipohon (lihat perenggan 20).]

Notes

For cases on damages for injunction, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 2589–2596.

For cases on encroachment, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1480-1481.

For cases on mandatory injunction, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 3064–3079.

Cases referred to

Ashby v White [1703] 2 Ld Raym 938 (refd)
Barker v The Queen (1983) 153 CLR 338,356 (refd)
Conway v Wimpey & Co (No 2) [1951] 2 KB 266 (refd)
Entick v Carrington (1765) 19 St Jr 1029 (refd)
Gregory v Piper (1829) 9 B & C 591 (refd)
Heysek & Anor v Boyden World Corp [1989] 1 MLJ 219 (refd)
Kelsen v Imperial Tobacco Co (of Great Britian And Ireland) Ltd [1957] QBD 334 (refd)
Konskier v B Goodman & Co Ltd [1928] 1 KB 421 (refd)
League Against Cruel Sports v Scott [1986] QB 240 (refd)
Masters v Brent BC [1978] QB 841 (refd)
McDonald v Associated Fuels (1954) 3 DLR 775 (refd)
Morris v Beardmore [1981] AC 446 (refd)
Ng Yee Fong & Anor v EW Talalla [1986] 1 MLJ 25 (refd)
R v Khan [1994] 3 WLR 899 (refd)
Redland Bricks Ltd v Morris & Anor [1970] AC 652 (refd)
Simpson v Weber (1925) 41 TLR 302 (refd)
Sivaperuman v Heah Seok Yeong Realty Sdn Bhd [1979] 1 MLJ 150 (refd)
Tay Tuan Kiat & Anor v Pritam Singh Brar [1987] 1 MLJ 276 (refd)
Timbermaster Timber Complex (Sabah) Sdn Bhd v Top Origin Sdn Bhd [2002] 1 MLJ 33 (refd)
Tinta Press Sdn Bhd v Bank Islam Malaysia Bhd [1987] 2 MLJ 192 (refd)
Turner v Thorne (1960) 21 DLR (2d) 29 (refd)
Wan Loong (Jelapang) Tin Min Sdn Bhd v Chia Ngen Yiok [1975] 2 MLJ 109 (refd)
Westripp v Baldock [1939] 1 All ER 279 (refd)
Willcox v Kettel [1937] 1 All ER 222 (refd)
Winterboiirne v Morgan (1809) 11 East 395 (refd)

Legislation referred to

National Land Code 1965 ss 44(1)(a), 384, 385

Maidzuara Mohammed (Logan Sabapathy & Co) for the plaintiff.
Ong Ming Suan (Simon Hue & Associates) for the defendant.

Abdul Malik Ishak J:

INTRODUCTION

[1] The plaintiff is essentially seeking in encl 1 a mandatory injunction requiring the defendant to remove from the plaintiff's land all permanent and/or temporary structures, be it in the form of ground anchors or otherwise, and a perpetual injunction to prevent the defendant and/or its agent from further encroaching and trespassing onto the plaintiff's land.

A THE UNDISPUTED FACTS

[2] From the relevant affidavits, the following objective and undisputed facts giving rise to the plaintiff's claim may be stated accordingly:

B (a) that the plaintiff is the registered and beneficial owner of Lot 55482, Geran 50059 in the Mukim and District of Kuala Lumpur ('the plaintiff's land') on which the plaintiff is undertaking the development of a residential project (see para 4 of the plaintiff's first affidavit in encl 2);

C (b) that the defendant is the owner of plots of land adjoining the plaintiff's land and the defendant is similarly undertaking the development of service apartments on the defendant's land (see par 5 of the plaintiff's first affidavit in encl 2);

D (c) that the defendant admits that in carrying out its development, the defendant had caused to be inserted ground anchors into the plaintiff's land without consent from the plaintiff thereby constituting an act of trespass (see para 7 of the plaintiff's first affidavit in encl 2 read together with para 8 of the defendant's affidavit in reply in encl 5); and

E (d) despite numerous requests by the plaintiff, the defendant has to date failed and/or refused to remove the ground anchors (see paras 8 to 12 of the plaintiff's first affidavit in encl 2).

THE PLAINTIFF'S ENTITLEMENT TO THE RELIEFS SOUGHT

F **[3]** As the registered proprietor of Lot 55482, the plaintiff is statutorily entitled by virtue of s 44(1)(a) of the National Land Code 1965 to the exclusive use and enjoyment of Lot 55482 including so much of the land below the surface. Without a doubt, the protection of such a right is beyond dispute. The plaintiff's land is the legal domain of the plaintiff and no one else. As the registered proprietor, the plaintiff stands in a better position than others. In *Ng Yee Fong & Anor v EW Talalla* [1986] 1 MLJ 25, Mohamad Azmi SCJ delivering the judgment of the then Supreme Court aptly said at pp 25–26 of the report:

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> As a matter of law, it cannot be disputed that a proprietor who establishes a proprietary right is *ex debito justitiae* entitled to an injunction unless it can be said against him that he has raised such an equity that it is no longer open to him to assert his legal or proprietary title. Further as stated at p 30 in *Kerr* on Injunctions (6th Ed):
>
> > After the establishment of his legal right and of the fact of its violation, a plaintiff is in general entitled as of course to a perpetual injunction to prevent the recurrence of the wrong unless there be something special in the circumstances of the case, such as laches or where the interference with the plaintiff's right is trivial.
>
> The onus is therefore on the appellants to establish that there is something special in the circumstances of the present case why the learned trial judge ought not to have granted the injunction in favour of the respondent.

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[4] So, the onus squarely falls on the defendant to establish why the injunctive reliefs sought by the plaintiff ought not to be granted. The defendant advanced the following reasons:

4.1 the defendant's ground anchors are below the ground, and start from a depth of 10 metres (approximately more than 30 feet) — see the averment at para 9 of encl 8;

4.2 the only building which is to be built on the plaintiff's land in the area where the ground anchors are would be a water tank pump house (see exh 'CS-2' of encl 5 and this has not been denied by the plaintiff);

4.3 to build the water tank pump house, the ground beams would only need to be at a depth of not more than two metres (approximately between 6 to 7 feet) below the ground level (see para 8 of encl 8 and this has not been denied by the plaintiff);

4.4 the presence of the defendant's ground anchors do not inhibit or prevent the building of the water tank pump house by the plaintiff in accordance to the plaintiff's development plans (see para 9 of encl 8 and this has not been denied by the plaintiff);

4.5 the defendant did not wilfully trespass onto the plaintiff's land and that the defendant was advised by its project consultants at that relevant point of time that what is now known to be the plaintiff's land was unoccupied and unalienated land;

4.6 the utilisation of the ground anchors was borne out of necessity as the plaintiff's land bordering the defendant's land is in the nature of a steep downward slope and that the ground anchors are required to support the contiguous bore-piled wall during construction (see para 7 of encl 5);

4.7 the defendant did not deny or disregard the plaintiff's rights when they were told of the trespass nor did the defendant behave unreasonably or wantonly;

4.8 upon receipt of the plaintiff's solicitor's letter, the defendant sought to meet up with the plaintiff for a resolution of the matter (see paras 15 to 17 of encl 5);

4.9 the defendant also gave the plaintiff written assurance that it would remove the ground anchors which were said to be of a temporary nature;

4.10 the defendant did not insist that the plaintiff has to prove that there has been trespass committed by the defendant and this would be difficult and expensive for the plaintiff to prove because the ground anchors were imbedded deep into the ground;

4.11 the defendant is unable to remove the ground anchors at this point in time because the defendant may run the risk of the contiguous bore-piled wall collapsing and causing injury and damage (see para 7 of encl 8) and, consequently, the defendant's refusal is not wilful but rather it is to prevent further damage; and

4.12 the defendant expects to be able to destress all the ground anchors in the plaintiff's land by the middle of August 2005 (see para 14 of encl 5).

[5] Bluntly put, the defendant is saying that the plaintiff would suffer no loss or inconvenience by the refusal to grant the injunction as compared to the risk of serious and substantial loss and injury to property and life if the defendant were ordered to remove the ground anchors now. In any event, the defendant says that it expects to destress the ground anchors in less than two weeks" time. For these reasons, the stand of the defendant is that the plaintiff's application for a mandatory injunction should be disallowed. At this juncture, it is ideal to refer to the case of *Tay Tuan Kiat & Anor. v Pritam Singh Brar* (1987) 1 MLJ 276. There, at page 279 of the report, Thean J. narrated the facts and alluded to the law in this way:

> The back of the defendant's house is less than 10 feet from the common boundary, and if the retaining wall is to be demolished and rebuilt, then it will have to be a vertical retaining wall all along the common boundary with a length of about 100 feet and the cost of such works would be considerable. Dr Lau (PW 5) estimated that the cost would be about $60,000. That seems to me to be a conservative estimate and probably it would be or could be more than that depending of course on how the works are to be carried out and the materials to be used. Even at $60,000 it is a large sum of money to be expended. The area of the plaintiff's" property encroached upon by the retaining wall is a narrow strip of land of about 11.8 sq. m. and even if the existing retaining wall is demolished and rebuilt all along the boundary but standing on the defendants" property the plaintiff's would gain effectively only this narrow strip of land. The defendant, on the other hand, would have to incur a considerable amount of money, and, in addition, because of the close proximity of the defendant's house to the common boundary, great care would have to be taken by his engineer, contractor and workers in the demolition of the existing wall and construction of the new wall; otherwise his land might slip and his house collapse. In my view, if the mandatory injunction asked for by the plaintiff's is granted the obligation imposed on the defendant is extremely onerous and is out of all proportion to the benefit to be gained by the plaintiff's. In my view, it will not produce a fair result. In *Charrington v Simons & Co Ltd* [1970] 1 WLR 725 the plaintiff complained that the defendants in breach of a negative covenant re-surfaced a tract and raised the level thereof above that of the surrounding land belonging to the plaintiff who was cultivating an orchard on his land. The difference in levels of the track and the surrounding land interfered with or impeded the plaintiff's cultivation on the surrounding land and he brought the action against the defendant seeking, *inter alia,* a mandatory injunction requiring the defendant to remove any part of the track above the level of the surrounding land. Buckley J. who heard the case granted the mandatory injunction but suspending it for 3 years, which suspension, however, was lifted by the Court of Appeal: see [1971] 1 WLR 599. Buckley J. in considering the grant of a mandatory injunction said, at p 730:

> > Where a mandatory order is sought the court must consider whether in the circumstances as they exist after the breach a mandatory order, and, if so, what kind of mandatory order, will produce a fair result. In this connection the court must, in my judgment, take into consideration amongst other relevant circumstances the benefit which the order will confer on the plaintiff and the detriment which it will cause the defendant. A plaintiff should not, of course, be deprived of relief to which he is justly entitled merely because it will be disadvantageous to the defendant. On the other hand, he should not be permitted to insist on a form of relief which will confer no appreciable benefit on himself and will be materially detrimental to the defendant.

The concept of 'fair result' as one of the criteria in determining the grant of a mandatory injunction was accepted by Megarry J in *Shepherd Homes Ltd v. Sandham* [1971] Ch. D. 340 where he said, at p 351:

> Second, although it may not be possible to state in any comprehensive way the grounds upon which the court will refuse to grant a mandatory injunction in such cases at the trial, they at least include the triviality of the damage to the plaintiff and the existence of a disproportion between the detriment that the injunction would inflict on the defendant and the benefit that it would confer on the plaintiff. The basic concept is that of producing a 'fair result', and this involves the exercise of a judicial discretion.

[6] And using that case as a leverage, the defendant argues that where the plaintiff would suffer absolutely no injustice in the event the injunction is not granted, damages would be more than an adequate remedy for the plaintiff. For this proposition of the law, the defendant relies on the case of *Timbermaster Timber Complex (Sabah) Sdn Bhd v Top Origin Sdn Bhd* [2002] 1 MLJ 33, CA. It is further argued that the plaintiff is not without remedy if it feels that it has suffered a loss as a result of the presence of the defendant's ground anchors in the plaintiff's land. It is suggested that the proper thing for the plaintiff to do would be to file an action for damages arising from the trespass. It is also argued that the plaintiff merely elects to file an action for an injunction only and that the plaintiff has not asked for an order for damages in lieu of the injunctions sought for by the plaintiff in the originating summons in encl 1. It is said that the balance of convenience is not in the plaintiff's favour and that encl 1 should be dismissed with costs.

[7] Speaking generally, mandatory injunctions are never granted before trial save in exceptional and extremely rare cases (per Abdoolcader J in *Wan Loong (Jelapang) Tin Min Sdn Bhd v Chia Ngen Yiok* [1975] 2 MLJ 109 which was applied by the Federal Court in *Sivaperuman v Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150, FC). The plaintiff's case too must be unusually strong and clear and the court must be assured that it would be just and equitable that the plaintiff's interest be protected by the immediate issue of an injunction otherwise irreparable injury and inconvenience would result (*Tinta Press Sdn Bhd v Bank Islam Malaysia Bhd* [1987] 2 MLJ 192, SC). It has been advised that the court should take whichever course that appears to carry the lower risk of an injustice if it should turn out that it was wrong to grant the injunction (per Chan Sek Keong J in *Heysek & Anor v Boyden World Corp* [1989] 1 MLJ 219). In other words, the overriding question remains one of the balance of convenience in all the circumstances of the case (per Abdoolcader J in *Wah Loong (Jelapang) Tin Mine Sdn Bhd v Chia Ngen Yiok*).

[8] The reasons advanced by the defendant to establish as to why the injunctive reliefs sought by the plaintiff ought not to be granted can easily be rebutted.

[9] The defendant makes the claim and claims that it did not wilfully trespass onto the plaintiff's land. Quite apart from the fact that this is a clear admission of trespass,

the defendant's explanation that it had proceeded in good faith based on the information relayed by its project consultants that Lot 55482 was unoccupied and unalienated is to be doubted when it would have been simple enough to conduct a land search on Lot 55482 which would have revealed the fact that the plaintiff is the registered owner of Lot 55482. Surely, it is not that difficult to conduct a land search. Private and official searches are permitted under ss 384 and 385 of the National Land Code 1965.

[10] The tort of trespass to land or what is known as *trespass quare clausum fregit* consists of three significant factors. Firstly, it is the act of entering upon land in the possession of another — here it would be the plaintiff as against the defendant who is the trespasser. Secondly, having entered upon such land the trespasser continues to remain on the land. Thirdly, the trespasser placing or projecting any object upon such land. It must be emphasised that in each case, the entry is without lawful justification (*Barker v The Queen* (1983) 153 CLR 338,356).

[11] The personal entry into the land of another constitutes the most common form of trespass. That unlawful entry may be made by a person or an animal *(League Against Cruel Sports v Scott* (1986) QB 240). Even the slightest crossing of the boundary is sufficient to constitute trespass. There may be cases where physical contact with the plaintiff's property would constitute trespass just like the case of *Gregory v Piper* (1829) 9 B & C 591 where 'a single stone had been put against the wall it would have been sufficient'. Trespass would also occur when a surveillance device is affixed to the wall of the house (*R v Khan* [1994] 3 WLR 899 , 905).

[12] Trespass to land is actionable per se without any proof of damage (*Ashby v White* (1703) 2 Ld. Raym 938). And liability is certainly strict. According to the case of *Entick v Carrington* (1765) 19 St Jr 1029, 1066: 'Every invasion of property, be it so minute, is a trespass.' It is not the law that a man cannot be a trespasser unless he knows he is one (*Conway v Wimpey & Co (No 2)* [1951] 2 KB 266, 273). If the entry is intentional, it is actionable even though that entry was made under a mistake or the defendant honestly believed that the land was his own or, like the present case, the land was unoccupied and unalienated or that the defendant believed that he had a right of entry on the land. In *Morris v Beardmore* [1981] AC 446, the House of Lords re-asserted the fundamental right of privacy of the home.

[13] Examples of trespass are abound. Thus, it would be trespass to place any thing upon the plaintiff's land like the case of *Turner v Thorne* (1960) 21 DLR (2d) 29 where parcels were delivered in error. It would also be trespass to cause any physical object or noxious substance into the house of another like the case of *McDonald v Associated Fuels* (1954) 3 DLR 775 where the court held that blowing carbon monoxide into a house constituted trespass. Just to cross the boundary of another person's land constitutes trespass. It is also trespass to cause a Virginia creeper to grow upon on the boundary as found by the court in *Simpson v Weber* (1925) 41 TLR 302. Likewise, it is also trespass if one were to lean a ladder at the boundary or place planks at the boundary or put up a shed at the boundary or even to pile rubbish against the boundary as exemplified in the case of *Westripp v Baldock* [1939] 1 All ER 279.

[14] Here, the defendant had caused to be inserted ground anchors into the plaintiff's land and that constitutes trespass. It is a trespass that will last so long as the ground anchors are inserted into the plaintiff's land and it gives rise to actions de die in diem — for so long as it lasts, and it is sufficiently obvious (*Winterbourne v Morgan* (1809) 11 East 395, 405). A

[15] A trespass of this nature will only abate once the defendant removes the ground anchors. It is a continuing trespass and successive actions will lie from day to day until the ground anchors are removed and in each action damages (unless awarded in lieu of an injunction: *Masters v Brent BC*; [1978] QB 841) are assessed up to the date of the action. But it must be borne in mind that more than one action will not lie on the same cause of action. Consequently, all damages resulting from the same cause of action must be recovered at one and the same time. This is a simple rule and it is designed to prevent the oppressive and vexatious litigation that might arise, if say, an injured person were at liberty to divide his claim and sue for successive actions for different portions of the loss sustained from a single cause of action. It seems that if things are placed on the land with leave and under licence and are not removed within a reasonable time after the licence is withdrawn, a continuing trespass is said to be committed (*Konskier v B Goodman & Co Ltd* ; [1928] 1 KB 421). B C D

[16] In my judgment, the defendant's conduct leaves much to be desired. While recognising that the plaintiff is the registered owner of Lot 55482, the defendant seeks to assert as a matter of right that the ground anchors should remain. The defendant must be advised that any entry beneath the surface of the plaintiff's land, at whatever depth, constitutes an actionable trespass. In *Willcox v Kettel* [1937] 1 All ER 222, an intrusion of concrete foundation by 20 inches was held to constitute trespass. The defendant adopts a nonchalant attitude and seeks to trivialise the plaintiff's plans of constructing a water tank pump house on the border of Lot 55482 where the defendant had trespassed by inserting the offending ground anchors. In short, the defendant seeks to claim a higher right, qua trespasser, over that of the plaintiff as the registered land owner. That cannot certainly be right. This is not the case where it can be objectively said that the defendant had accidentally invaded the plaintiff's rights. Now, putting the defendant's case at its highest point, the failure of the defendant to carry out a land search is indicative of a reckless disregard, and not merely an accidental invasion, of the rights of the plaintiff as the registered owner of Lot 55482. And at its lowest end, the defendant's stand would be this. That notwithstanding its claims of innocent trespass, nevertheless the defendant proceeds to make a calculated decision to remain in trespass by weighing its benefits of continuing in trespass against the rights of the plaintiff to exclusive use and enjoyment of Lot 55482. Without a doubt, the defendant recognises that it has committed trespass on the plaintiff's land. And instead of picking the correct remedial action by removing the ground anchors, the defendant seeks to justify and entrench its position by insisting that it has a better right over Lot 55482 than the plaintiff. In such a situation, it is not open to the defendant to trivialise the harm suffered by the plaintiff in an attempt to avoid the grant of the mandatory and perpetual injunctions by this court. In this regard and towards this end, the following authorities are certainly instructive. E F G H I

[17] In *Redland Bricks Ltd. v Morris And Another* [1970] AC 652, HL, Lord Upjohn writing for the House of Lords aptly said at p 666 of the report:

> (a) where the defendant has acted without regard to his neighbour's rights, or has tried to steal a march on him or has tried to evade the jurisdiction of the court or, to sum it up, has acted wantonly and quite unreasonably in relation to his neighbour he may be ordered to repair his wanton and unreasonable acts by doing positive work to restore the status quo even if the expense to him is out of all proportion to the advantage thereby accruing to the plaintiff. As illustrative of this see *Woodhouse v Newry Navigation Co* [1898] 11.R. 161.

[18] In *Kelsen v Imperial Tobacco Co (of Great Britian and Ireland) Ltd* [1957] QBD 334, McNair J, succinctly said at pp 346–347 of the report:

> There may also be cases in which, though the four above-mentioned requirements exist, the defendant by his conduct, as, for instance, hurrying up his buildings so as if possible to avoid an injunction, or otherwise acting with a reckless disregard to the plaintiff's rights, has disentitled himself from asking that damages may be assessed in substitution for an injunction.
>
> I have no doubt at all that I have a discretion here which I have to exercise judicially to award damages in lieu of an injunction if I see fit. It is true that the injury to the plaintiff's legal rights in this case is small. It has already been stated that this sign in his airspace does him no harm and does not diminish his enjoyment. I doubt whether it is a case in which one can estimate the damage in terms of money, because the damages really, if estimated at all, would have to be stated to be nominal. But I cannot find that it would be in any way oppressive to the defendants to grant an injunction. It is true that considerable expense, stated to be some £220, was incurred some seven years ago in erecting this sign, but I have no evidence at all as to whether the defendant company have not had good value for that expenditure. I do know that another cigarette manufacturing company are apparently prepared to pay the plaintiff £75 a year for a smaller advertisement in a less prominent position. Furthermore, I think it is relevant here that the defendants throughout the case have been insisting upon the right to display this advertisement as a matter of right. I think that is a circumstance which the court is entitled to take into account in determining whether a small money payment with a declaration of right should be sufficient or whether an injunction should be granted. Cases in which an injunction has not been granted on the ground of hardship have, I believe, been mostly cases in which there has been some accidental invasion of the plaintiff's rights. I was referred by Mr. Lawson to *Goodson v Richardson* (1874) LR 9 Ch 221, where a strong Court of Appeal certainly held that the mere fact that the invasion of the highway in that case did not cause any serious damage to the owner of the highway did not disentitle him from an injunction. I am further impressed by this fact, that if I refuse to grant an injunction in this case there is nothing to prevent the defendant company from continuing to display this sign and leave it to the plaintiff again to put forward a subsequent claim for damages in a further action. If I were to decide that an appropriate remedy would be a small money payment of nominal damages, I would be, in effect, saying that although such implied licence, if any, as the defendants have has been determined, nevertheless the defendants are entitled to continue to display their sign.
>
> In my judgment, bearing in mind that both parties have in pursuance of what they claimed to be their business interests attempted to bring commercial pressure to bear one upon the other, this is a proper case in which the court should direct that there should be a mandatory injunction that this sign be removed forthwith.

Halsbury's Laws of England, Volume 24, (4th Ed) at para 936 carries the following write-ups:

> The power of awarding damages in lieu of an injunction is discretionary and must be exercised with an intimate knowledge of the facts and so as to prevent people being compelled to sell property against their will at a valuation. Moreover, a defendant must not be encouraged to believe that he may do a wrongful act on the payment of a given sum in terms of money. Where a breach of an express covenant is committed, either by the original covenantor or by an assignee who is bound by it, and causes substantial damage, the court has no discretion to award damages in lieu of an injunction. The question whether the defendant knew that he was wrong is of importance. His conduct may be a determining factor in deciding whether to grant an injunction or damages.

[19] It can be surmised that the defendant, through its reckless disregard of the plaintiff's rights and the subsequent conduct in insisting that it has a better right over that of the plaintiff as the registered landowner, has disentitled itself from asking that damages be assessed in substitution for the injunctive reliefs sought. In my judgment, this is not a case where damages may be said to be easily assessed and ascertainable without evidence being led. The ramifications of the defendant's trespass are numerous including but not limited to delay involved in re-planning and seeking the necessary approvals for the re-location of the water pump house for which damages are not easily ascertainable. Even if it were to be argued by the defendant that damages are ascertainable, such damages would be substantial as it would involve the delay in the completion of the plaintiff's development which may further lead to claims by disgruntled end purchasers. In such a situation, the court clearly has no discretion to award damages in lieu of the injunctions sought.

[20] An overriding factor that has to be taken into account is the fact that any prejudice or oppression contended by the defendant has been brought about entirely by its own reckless disregard and/or negligence in failing to carry out the proper land searches to ascertain the lawful ownership of Lot 55482. Had the defendant done so, the situation today would be different as this court would not have to consider encl 1. The law should not encourage trespassers especially a reckless trespasser like the defendant who believes that having entrenched its position, it stands to gain a better right over that of the registered landowner like the plaintiff here.

CONCLUSION

[21] The plaintiff is clearly entitled, as a matter of right, to the injunctive reliefs as prayed for in encl 1. The defendant has failed to show any special circumstances to establish why the injunctive reliefs sought by the plaintiff ought not to be granted.

[22] Indeed, it is quite apparent from the facts, that by its conduct the defendant has disentitled itself from opposing the grant of the injunctions on the ground that damages should be awarded in lieu thereof. This court cannot remain idle. The law cannot and should not be seen to be assisting the recalcitrant defendant, who notwithstanding its acceptance of the trespass committed by itself, proceeds to

A remain in trespass upon a calculation of the benefits to be gained from that trespass against the rights of the plaintiff as the registered landowner. I must, accordingly, give an order in terms of encl 1 with costs to be paid by the defendant to the plaintiff.

Order accordingly.

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Reported by Sally Kee

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